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No.

In The

# Supreme Court of the United States

October Term, 1997

JAMES A. CROCHIERE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## PETITION FOR WRIT OF CERTIORARI

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55 pp

## QUESTIONS PRESENTED

Whether an overt act is required to prove commission of a conspiracy in violation of 18 U.S.C. § 241.

Where eyewitness credibility is a crucial issue at a criminal trial, whether denial of defendant's motion for a jury view of the scene, a jail cellblock, is fundamentally unfair in violation of Fifth Amendment due process and Sixth Amendment confrontation guarantees.

## LIST OF PARTIES

James A. Crochiere, Petitioner,

United States of America, Respondent.

All parties appear in the caption
of the case on the cover page.

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James A. Crochiere respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to this petition and is reported at 129 F.3d 233 (1st Cir. 1997). The opinion of the district court (App. 24a-27a, *infra*) is unreported.[1]

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 18, 1997 (App. 16a, *infra*). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part, that

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. V.

The Sixth Amendment to the Constitution of the United States provides, in relevant part, that

> In all criminal prosecutions, the accused shall enjoy

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1. References in the petition will be cited as follows: to the Appendix to the Petition as (App. __, *infra*); to the trial transcript by volume and page (Tr. Vol. __, p. __).

> the right . . . to be confronted with the witnesses against him . . .

U.S. Const. Amend. VI.

18 U.S.C. § 241 makes it unlawful for:

> two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same . . .

18 U.S.C. § 371 states, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

Petitioner was indicted by a federal grand jury for the District of Massachusetts in October 1995 for conspiracy against the rights of citizens in violation of 18 U.S.C. § 241 and deprivation of civil rights in violation of 18 U.S.C. § 242 (Cr. No. 95-10312-MLW). It was alleged that petitioner, a county correctional officer, conspired with one inmate ("Lambert") to violate the civil rights of another inmate ("Nieves") by the overt acts of petitioner obtaining a cup of scalding liquid from Lambert, carrying the cup to Nieves' cell, and pouring the liquid on Nieves. It was further alleged that petitioner assaulted Nieves

by pouring scalding liquid on him, thereby depriving Nieves of his civil rights as protected by the Constitution.

In October 1996, petitioner's trial commenced in the district court before a jury. Lambert, two other inmates and a correctional officer, all reportedly assigned to Nieves' cell block at the time of the alleged crime, testified against petitioner. The credibility of these government eyewitnesses, especially in light of the obstructed views on a cell block, was a critical issue at trial. The district court denied petitioner's motion for a jury view of the cell block in question. In instructing the jury on the elements of a conspiracy under § 241, the district court stated that proof of the existence of an overt act is not required. The jury verdict found petitioner guilty of conspiracy in violation of § 241, but not guilty of the substantive civil rights charge in violation of § 242. The district court issued an order for petitioner's detention pending appeal, noting that the question of whether an overt act is required to prove a § 241 conspiracy could be considered a "serious question" on appeal. A judgment of conviction was entered by the district court.

The court of appeals affirmed the judgment of the district court. While acknowledging that the decisions of the circuits on this question are conflicting, the court of appeals decided that § 241 contains no overt act requirement. Because of the acquittal on the substantive charge, the court of appeals declined to decide whether denial of a jury view was an abuse of discretion. However, the appeals court acknowledged that a jury view could have had an impact on the jury's evaluation of witness credibility.

**A. Jury Instructions: Overt Acts**

This case involves a definition of the elements of conspiracy under 18 U.S.C. § 241. It is an issue the Supreme Court has not previously decided.

A defendant's Fifth Amendment due process right is implicated when a court's instructions to the jury do not reflect the elements of the crime charged. *See United States v. Sloan*, 811 F.2d 1359, 1363 (10th Cir. 1987). The district court instructed the jury in the instant case that proof of an overt act in furtherance of the conspiracy was unnecessary to convict petitioner of a § 241 violation. The court of appeals agreed. However, the Sixth Circuit has indicated that proof of an overt act is required under § 241. *See United States v. Brown*, 49 F.3d 1162, 1165 (6th Cir. 1995). The Fifth Circuit has recently agreed with that interpretation. *See United States v. Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991); *United States v. McKenzie*, 768 F.2d 602, 606 (5th Cir. 1985); *United States v. Saenz*, 747 F.2d 930, 937 (5th Cir. 1984); *United States v. Kimble*, 719 F.2d 1253, 1256 (5th Cir. 1983). But the Fifth Circuit has also stated that no overt act is required by § 241. *See United States v. Morado*, 454 F.2d 167, 169 (5th Cir. 1972). The Ninth Circuit decided § 241 does not require proof of an overt act in furtherance of the conspiracy. *See United States v. Skillman*, 922 F.2d 1370, 1375-76 (9th Cir. 1991).

The court of appeals relied on *United States v. Shabani*, 513 U.S. 10 (1994), to decide this question for the First Circuit. *Shabani* held that 21 U.S.C. § 846, concerning drug conspiracy, did not require proof of an overt act because the statute contained no explicit language in that regard.

The question presented here is whether § 241 requires the government to prove the existence of an overt act in furtherance of the conspiracy.

**B. Jury View**

This case also involves the question of whether a jury view is necessary in order for an accused to receive a fundamentally

fair trial, pursuant to the Fifth Amendment due process and Sixth Amendment confrontation clauses, where the critical issue at trial is eyewitness credibility.

The Fifth Amendment right to due process guarantees a criminal defendant the right to present evidence on a critical issue in the case against him. *See Howard v. United States*, 656 A.2d 1106, 1117-1118 (D.C. App. 1995). The purpose of the Sixth Amendment confrontation clause is to provide the defendant with an opportunity to test the credibility of the evidence introduced against him. *United States v. Downing*, 454 F.2d 373, 376 (10th Cir. 1972). To be fundamentally fair, a trial must afford a defendant the right to truly confront and cross-examine witnesses against him. *See Barber v. Page*, 390 U.S. 719 (1968).

A view provides "independent evidence," *In re Application to Take Testimony in Criminal Case Outside District*, 102 F.R.D. 521 (1984), and a ruling on a motion for a view is an evidentiary ruling. *Bundy v. Dugger*, 850 F.2d 1402, 1422, *reh'g denied*, 859 F.2d 928 (11th Cir.), *cert. denied*, 488 U.S. 1034 (1989). Where the evidence at issue is "crucial and highly significant," an erroneous ruling may "constitute a denial of fundamental fairness." *Id.*

A defendant's right to use a jury view as an opportunity to provide evidence on a critical trial issue, as well as lay the foundation for a meaningful test of witness credibility during later cross-examination, has been weighed against the practical concerns of the trial court. Under certain conditions, a trial court's denial of a jury view has been upheld. *United States v. Williams*, 44 F.3d 614 (7th Cir. 1995) (juror safety, difficulty in transporting jurors, and existence of an adequate video depiction of the scene); *United States v. Pettiford*, 962 F.2d 74, 76 (1st Cir. 1992) (view cumulative of photographic evidence); *United*

*States v. Drougas*, 748 F.2d 8 (1st Cir. 1984) (view cumulative of photographic evidence and scene recently altered); *see also United States v. Culpepper*, 834 F.2d 879 (10th Cir. 1987) and *Bundy v. Dugger, supra*. Additionally, courts have denied views on balance where the item sought to be viewed was not relevant, *United States v. Sarmiento*, 744 F.2d 755, 766 (11th Cir. 1984); the area to be viewed was found to be dangerous by the court, *United States v. Passos-Paternina*, 918 F.2d 979, 986 (1st Cir. 1990); or the view would be unnecessarily time consuming and cumulative of evidence, *United States v. Johnson*, 767 F.2d 1259 (8th Cir. 1985).

The question presented here is whether, in the absence of said practical trial court concerns, fundamental constitutional fairness requires a jury view when eyewitness credibility is the critical issue and the vantage point is unique.

**C. Proceedings Below**

On October 10, 1995, a federal grand jury indicted petitioner. Count One of the indictment alleged conspiracy to interfere with the civil rights of an inmate, in violation of 18 U.S.C. § 241. Count Two alleged deprivation of the inmate's civil rights through assault with scalding liquid, in violation of 18 U.S.C. § 242. Count One contained a delineation of specific overt acts as part of the conspiracy charge (App. 28a-30a, *infra*). On October 18, 1995, petitioner was arraigned and the district court accepted a plea of not guilty as the both counts.

On October 21, 1996, petitioner's jury trial commenced before the district court. Petitioner's motion for a view was filed on October 22, 1996. The motion was denied by the court on October 28, 1996. The trial judge ruled that the view would be "an unnecessary use of time" and "potentially confusing and misleading," (Tr. Vol. 6, pp. 144-145). After the close of

evidence, the district court instructed the jury on October 30, 1996. The court stated that proof of the existence of an overt act in furtherance of the conspiracy was not required under § 241 (Tr. Vol. 8, pp. 82-93). The petitioner did not submit any proposed instructions on § 241 or object to the instructions as given (Tr. Vol. 8, pp. 93, 96-99). The jury returned its verdict on October 30, 1996, finding petitioner guilty on Count One (§ 241 conspiracy) and not guilty of Count Two (§ 242 substantive civil rights charge). On November 6, 1996, petitioner's motion for judgment of acquittal and motion for new trial were timely filed. The district court issued its order denying both motions on November 17, 1996. Petitioner was sentenced on February 20, 1997.

On February 24, 1997, the district court issued an order for petitioner's detention pending appeal. In that order, the court noted the issue of whether § 241 requires proof of an overt act in furtherance of conspiracy was an "arguably 'serious question' on appeal." The court noted further that there was a split of authority on the issue (App. 26a-27a, *infra*). The district court's judgment of conviction was issued on March 11, 1997 (App. 17a-23a, *infra*).

Petitioner's Notice of Appeal from judgment of conviction was timely filed on February 28, 1997. Argument was heard before the court of appeals in October 1997. A judgment affirming the district court was entered and opinion issued on November 18, 1997 (App. 1a-16a, *infra*). The court of appeals reviewed the jury instruction concerning § 241 for plain error. While finding no error in the instruction, the court of appeals did acknowledge the split among circuits on this question. The court relied instead on the holding in *United States v. Shabani, supra*, notwithstanding that *Shabani* interprets 21 U.S.C. § 846, a drug conspiracy statute. The court also looked to the elements of common law conspiracy as well as the intent of Congress in

enacting the Enforcement Act of 1870 (currently § 241) (App. 8a-13a, *infra*).

In regard to the jury view issue, the court of appeals reviewed the district court decision to deny petitioner's motion for a view for abuse of discretion. The court of appeals stated that petitioner made "a non-frivolous argument in support of the view" of the cell block as to the § 242 substantive charge of a civil rights violation (App. 6a, *infra*). The court observed that the views from a cell block are not within the common experience of the average juror. The court further observed that the "evidence . . . was somewhat inconsistent, and the credibility of each witness' story as to what he saw and when he saw it was critical," (App. 6a, *infra*). It noted petitioner's contention that photographs or charts "could not do adequate justice to the layout and special arrangements of the cell block" (App. 6a, *infra*). But the court attached far more significance to witness credibility problems as they related to the § 242 substantive charge than to the § 241 conspiracy charge. Because petitioner was acquitted of assaulting the jail inmate with scalding liquid, thereby violating his civil rights in violation of § 242, the court of appeals declined to decide whether the district court's denial of a jury view was an abuse of discretion. Even so, the court of appeals conceded that "a jury view might have had some indirect impact of the jury's assessment of witness credibility. . . ." on the § 241 conspiracy charge (App. 7a, *infra*). The court concluded that other opportunity existed to impeach the witnesses' credibility and that "a view was unlikely to have altered" the jury verdict of guilty as to § 241 (App. 7a-8a, *infra*).

## REASONS FOR GRANTING THE WRIT

The First Circuit acknowledges its decision holding § 241 requires no proof of an overt act in furtherance of the conspiracy conflicts with other circuits (App. 9a, *infra*). The need for

guidance from this Court is immediate. Further, the decision of the First Circuit affirming denial of a jury view, when eyewitness credibility is the critical trial issue, conflicts with Constitutional guarantees of fundamental fairness and declines to apply the balancing test articulated by the circuits. Additionally, the decision below is erroneous and the issues presented are important.

## I.

## THE COURT OF APPEALS INTERPRETATION OF 18 U.S.C. § 241 CONFLICTS WITH THE SIXTH CIRCUIT'S INTERPRETATION, THE FIFTH CIRCUIT'S MOST RECENT INTERPRETATIONS, AS WELL AS 18 U.S.C. § 371, AND IT EXASPERATES ANY SPLIT OF AUTHORITY IN THE DISTRICT COURTS.

In *Brown* the Sixth Circuit stated clearly that § 241 does require proof of an overt act in furtherance of the conspiracy. 49 F.3d at 1165. The Fifth Circuit's most recent decisions concerning § 241 are in accord with the Sixth Circuit. *See United States v. Greer, supra* (5th Cir. 1991); *United States v. McKenzie, supra* (5th Cir. 1985); *United States v. Saenz, supra* (5th Cir. 1984); and *United States v. Kimble, supra* (5th Cir. 1983). However, in an earlier decision, the Fifth Circuit did state that § 241 does not require proof of an overt act. *United States v. Morado, supra* (5th Cir. 1972). The Ninth Circuit has also held that a conviction under § 241 does not require proof of an overt act. *United States v. Skillman, supra.* The First Circuit has never before decided the question of whether proof of an overt act is an element of conspiracy, pursuant to § 241.

The First Circuit's interpretation of § 241 conflicts with the Sixth Circuit's interpretation and the Fifth Circuit's recent interpretations of that statute. The First Circuit's decision also

conflicts with 18 U.S.C. § 371, the general conspiracy statute, which does require an overt act in furtherance of the conspiracy. In making its interpretation, the First Circuit, relying on the Supreme Court case of *United States v. Shabani, supra*, reasons that § 241 contains no requirement of proof of an overt act in furtherance of the conspiracy because the language of the statute is silent on this point. However, *Shabini* construes only the elements of the drug conspiracy statute 21 U.S.C. § 846. It does not construe the elements of 18 U.S.C. § 241. Moreover, such conflict among the circuits exasperates any split of authority in the district courts, where § 241 cases are certainly not rare and are always very significant.

## II.

## THE COURT OF APPEALS AFFIRMATION OF THE DECISION TO DENY A JURY VIEW CONFLICTS WITH CONSTITUTIONAL GUARANTEES OF FUNDAMENTAL FAIRNESS AS WELL AS THE BALANCING TEST APPLIED BY THE CIRCUITS, AND IT EXASPERATES ANY SPLIT OF AUTHORITY IN THE DISTRICT COURTS.

There is not question that a criminal defendant has a Fifth Amendment due process right to present evidence on any critical issue in the case against him, *Howard v. United States, supra*, or that a jury view provides "independent evidence," *In re Application to Take Testimony in Criminal Case Outside District, supra*. Nor is there any question that the purpose of the Sixth Amendment confrontation clause is to provide the defendant with a meaningful opportunity to test the credibility of the evidence introduced against him, *United States v. Downing, supra*, or that a trial must afford the defendant an opportunity to truly confront and cross-examine witnesses for it to be a fundamental fair proceeding, *Barber v. Page, supra*. Certainly,

a view can lay the foundation for such cross-examination. Although the decision to allow a view is within the sound discretion of a trial judge, *United States v. Pettiford, supra*, in applying the balancing test between constitutional rights and practical trial concerns, the circuits have articulated certain standards. The Seventh Circuit held that concern for juror safety and transportation, as well as the existence of an adequate video depiction justified denial of a view. *United States v. Williams, supra*. The Tenth Circuit held denial of a view was not an abuse of discretion where the site had been altered since the date of the offense and, in any event a view would be cumulative of photographic evidence. *United States v. Culpepper, supra*. The Eighth Circuit decided a trial court's denial of a view was sound where said view would be unnecessarily time consuming and cumulative of evidence. *United States v. Johnson, supra*. The Eleventh Circuit found a trial court within its discretion in denying a view where the subject matter of the view was not relevant to the charge. *United States v. Sarmiento, supra*. It is noteworthy that the First Circuit has articulated similar standards for affirming denial of a jury view. *See United States v. Pettiford, supra* (view cumulative of photographic evidence); *United States v. Drougas, supra* (view cumulative of photographic evidence and scene recently altered); and *United States v. Passos-Paternina, supra* (the area to be viewed was specifically found to be dangerous by the court).

The First Circuit's affirmation of the district court's decision to deny a jury view in the instant case conflicts with Fifth Amendment due process and Sixth Amendment confrontation guarantees. The decision also conflicts with the Seventh, Eighth, Tenth, Eleventh, and indeed, the First Circuit's articulated criteria defining the limits of judicial discretion in this regard. The court of appeals did not find any logistical difficulties or alternative sources of evidence weighty enough to justify denial of a jury view. On the contrary, although the district court had reasoned

that view would be "an unnecessary use of time" and "potentially confusing and misleading," (Tr. Vol. 6, p. 144), the court of appeals appeared to dismiss that analysis and acknowledged that testing government eyewitnesses' accounts of an uncommon setting was central to petitioner's defense. Noting that inmates "did at times testify to having been able to see beyond what was happening in front of their own cells;" that "the evidence in this case was somewhat inconsistent, and the credibility of each witness' story as to what he saw and when he saw it was critical;" that "the average juror had not seen a jail cell block and might well have difficulty understanding the layout and the ability (or inability) of inmates to see up and down the corridor . . . ;" and petitioner's contention that "photographs and charts could not do adequate justice to the layout and spacial arrangement of the cell block," the court of appeals found petitioner's argument in support of the view to be "non-frivolous," (App. 6a, *infra*). But the court of appeals further found the view relevant "primarily" to the substantive § 242 Count, not to the conspiracy § 241 Count, "[a]lthough a view might have had some indirect impact on the jury's assessment of witness credibility" concerning the conspiracy count. The court held the acquittal of petitioner as to the § 242 violation obviated the need to rule on whether the district court had abused its discretion (App. 7a, *infra*). Such holding can only serve to exasperate any split of authority in the district trial courts, where motions for jury views are commonplace.

## III.

## THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

The court of appeals reviewed the district court's jury instructions as to the requirements of § 241 for plain error. *United States v. Jones*, 108 F.3d 668, 670 (6th Cir. 1997).

Under this standard only "particularly egregious errors" may be corrected. *United States v. Frady*, 456 U.S. 152, 163 (1982). These are errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). The error must be "obvious" or "plain" and it must "affect substantial rights" *i.e.*, "the error must be prejudicial, affecting the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725 (1993). A defendant's Fifth Amendment due process right is violated when a court's instructions to the jury do not reflect elements of the crime charged. *See United States v. Sloan, supra.* "[T]o convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution." *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991). The decision of the circuit court of appeals, finding no error in the district court's instructions, was erroneous.

The court of appeals reviewed the district court's order denying a jury view for an abuse of discretion. *United States v. Williams, supra.* The district court order violated Constitutional guarantees of fundamental fairness and the balancing tests established as a matter of law. The decision of the court of appeals, declining to decide the question of whether there was an abuse of discretion in denying the view, was erroneous. The court of appeals decided the view was only relevant to § 242, thereby substituting itself as the thirteenth juror.

## IV.

## THE QUESTIONS PRESENTED ARE IMPORTANT.

It is important that this Court construe the requirements of § 241. It is fundamentally unfair for a defendant to be convicted of a crime of which the elements are uncertain. Moreover, this Court has construed other conspiracy statutes. *See Nash v.*

*United States*, 299 U.S. 373 (1913) (Sherman Antitrust conspiracy) and *Singer v. United States*, 323 U.S. 338 (1945) (Selective Service Act conspiracy). It is particularly critical in light of the overt act requirement of the general conspiracy statute 18 U.S.C. § 371.

It is important that this Court define the limitations of judicial discretion in regard to jury views. Constitutional guarantees of fundamental fairness dictate that a defendant has the right *per se* to assure that the jury is fully informed as to the circumstances of the case against him as well as to test the strength of the evidence.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1555

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES A. CROCHIERE,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before
Stahl, *Circuit Judge*,
Cyr, *Senior Circuit Judge*,
and Lynch, *Circuit Judge*.

*Marc D. Padellaro*, with whom *Joseph W. Monahan, III* and *Mary Jane Walsh* were on brief, for appellant.

*S. Theodore Merritt*, Assistant United States Attorney, with whom *Donald K. Stern*, United States Attorney, was on brief, for appellee.

November 18, 1997

*Appendix A*

**LYNCH,** ***Circuit Judge.*** James A. Crochiere, a correctional officer at the Worcester County Jail and House of Correction, was indicted on charges of violation and conspiring to violate the civil rights of a pre-trial detainee at the jail. *See* 18 U.S.C. §§ 2, 241, 242. Crochiere was charged with the act of and conspiracy to pour boiling water on the groin and upper thigh of Jose Nieves, who had been arrested on the charges of murdering a young girl. A jury found Crochiere guilty of the conspiracy count and acquitted him of the substantive count.

Crochiere makes three arguments on appeal. He challenges the district court's denial of his motion for a jury view of the scene of the crime. He contends that a portion of the district court's jury instructions on the conspiracy count was erroneous in that the instructions charged that no "overt act" is required under the criminal civil rights conspiracy statute, 18 U.S.C. § 241. He also argues that the evidence was insufficient to convict him on the conspiracy count. We affirm and hold that 18 U.S.C. § 241, the civil rights conspiracy statute, does not require an overt act.

I.

We state the facts in the light most favorable to the verdict. *See United States* v. *Montas,* 41 F. 3d 775, 778 (1st Cir. 1994). On April 18, 1993, Jose Nieves was brought to the jail to await trial on charges that he murdered a twelve year old girl. Nieves, a heroin addict who was undergoing detoxification, became highly agitated and unruly, banging his head against the bars of his cell. Nieve's cut open his forehead. Several correctional officers, Crochiere among them, came to Nieves's cell to restrain him. The officers handcuffed Nieves and strapped him into a restraint chair. Nieves strongly resisted; the officers placed a

blanket over Nieves's head to prevent him from spitting. The first time the officers placed Nieves in the restraint chair, he was able to free himself from the arm straps. The second attempt at restraint was more successful, and once Nieves was securely in the chair he was no longer a threat to himself or to the officers.

Rodney Lambert was another pre-trial detainee; he was indicted on the same federal civil rights charges as Crochiere. He pled guilty, cooperated with the government and testified against Crochiere. His cell was located three cells down from Nieves's cell. Lambert had a hot pot in his cell, and after Nieves was restrained and the commotion died down, Lambert began boiling water for soup. Crochiere approached Lambert's cell and asked Lambert if he had any salt. Crochiere wanted to rub salt into the open wound on Nieves's forehead. Lambert said that he did not, but offered Crochiere an alternative weapon: a cup of boiling water. Crochiere initially declined the offer, but soon returned and requested the boiling liquid. Lambert poured a cup of steaming water for Crochiere, who took the cup and walked toward Nieves's cell. Moments later, Nieves screamed out in pain, exclaiming that "[t]hey burned my pee pee," and that he was hurt. Following these screams, another voice said, "Now you know how the little girl felt."

Among the government's witnesses who testified to these events were Michael Robichaud, a correctional officer on duty on the evening of April 18, 1993; Foimai Tau, a Unit Supervisor on duty the same evening; and Scott Croteau, Anibal Antuna, and Rodney Lambert, three inmates whose cells were located in the same tier as Nieves's cell.

Nieves complained to Officer Robichaud of pain in his groin. Robichaud related this information to Lieutenant Tau,

the Unit Supervisor. Lieutenant Tau went to see Nieves, who asked to see a nurse because someone had poured hot water on him. Lieutenant Tau summoned Nurse Elaine Gustafson, who spoke with Nieves but, being at the end of her shift, refused to examine him. Nurse Dorothy Hester, the supervising nurse at the jail, did examine Nieves the following morning. Because Nieves told her he had an injury in his groin area, she examined that area and observed a second-degree burn with blisters. The burn extended down to his inner thigh area, and upwards to his testicles.

On April 20, two days after the burning, Nieves was taken to Bridgewater State Hospital for a psychological examination as to his competence to stand trial for the charge of murder. A correctional officer at Bridgewater State conducted a routine strip search of Nieves and observed blisters and injury in Nieves's groin area. Pursuant to routine practice the officer photographed the injury, and the photograph was later sent, along with a report, to the Worcester County Sheriff's Office.

Kevin Foley, Assistant Deputy Superintendent of the Worcester County Sheriff's Office, then commendably initiated an investigation of the burning. Foley requested reports regarding Nieves's injury from several individuals, including Crochiere, Tau, and Gustafson. All of them denied that Nieves had been burned, or that Nieves had complained of pain and of being burned by a correctional officer. The following year, around September of 1994, the Federal Bureau of Investigations began an investigation into the events surrounding Nieves's injury, which, in turn, led to the prosecution of this case. Nurse Gustafson and Supervisor Tau eventually testified that they had previously reported falsely on the events of April 18, 1993, and stated that Nieves actually

did complain of pain in his groin and told them that he had been burned with hot water.

II.

*Jury View*

On the second day of trial, Crochiere filed a motion for a jury view or the lower left tier of cells at the jail, the location of these events. Crochiere argued that it was only by viewing the tier of cells that the jurors could properly assess the validity of the statements made by several of the witnesses — specifically inmates Croteau and Lambert — about what they saw and heard on that night. The district judge initially deferred the decision on the view, so that he could hear more of the evidence and "have a better sense of whether a view [would be] important and worthwhile in the context of the case." The court ultimately denied the view, reasoning that it would be "not just an unnecessary use of time, but actually potentially confusing and misleading, because neither Croteau nor Lambert said that they could see anybody going into Nieves's cell or see anything that was going on in the cell."

The decision to permit a view is entrusted to the sound discretion of the trial court. *See United States* v. *Pettiford*, 962 F.2d 74, 76 (1st Cir. 1992); *United States* v. *Passos-Paternina*, 918 F.2d 979, 986 (1st Cir. 1990). A court generally acts within that discretion in denying a motion for a view when there is sufficient evidence describing the scene in the form of testimony, diagrams, or photographs. *See Pettiford*, 962 F.2d at 76; *United States* v. *Drougas*, 748 F.2d 8, 31 (1st Cir. 1984). In making this determination, the court may consider such factors as the orderliness of the trial, whether the jury would

be confused or misled, whether it would be time-consuming or logistically difficult, and whether cross-examination had been permitted regarding the details of the scene. *See id.; Pettiford,* 962 F.2d at 76; *Passos-Paternina,* 918 F.2d at 986; *Bundy* v. *Dugger,* 850 F.2d 1402, 1422 (11th Cir. 1988).

Crochiere made a non-frivolous argument in support of the view as to the events in Nieves's cell which underlay the violation of civil rights charge, as opposed to the conspiracy charge. Inmates Croteau and Lambert did at times testify to having been able to see beyond what was happening in front of their own cells. For example, Lambert testified that he could see officers walking into and out of Nieves's cell, and that he could see Crochiere "in front of one of the cells to [his] right." The evidence in this case was somewhat inconsistent, and the credibility of each witness's story as to what he saw and when he saw it was critical. The average juror has not seen a jail cell block, and might well have difficulty understanding the layout and the ability (or inability) of inmates to see up and down the corridor where Nieves's cell was located. Crochiere contended that photographs and charts could not do adequate justice to the layout and spacial arrangements of the cell block. *Cf. Pettiford,* 962 F.2d at 76 (upholding denial of view where view would not have provided clearer portrayal of scene than photographs did).

It is also true, as the district judge noted, that neither Croteau nor Lambert testified that they could see into Nieves's cell. Most of the inmates' testimony was of what they heard, and what they saw happen in front of their own cells. A view would not have helped to discredit this testimony. Additionally, the defendant had ample opportunity to cross-examine the various government witnesses on their ability to perceive what

they claimed to see. The question of the view was not an easy one, and the district judge's decision was considered.

In light of the acquittal on the substantive civil rights charge, we need not decide the question of whether there was an abuse of discretion in denying the view. Any error Crochiere may claim in this ruling was harmless. "In the usual case, a non-constitutional evidentiary error will be treated as harmless if it is highly probable than the error did not contribute to the verdict." *See United States* v. *Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997). The government bears the burden of persuasion in a harmless error analysis. *See id.*

The view was relevant primarily to the substantive § 242 Count, of which Crochiere was acquitted, and not to the conspiracy count. The evidence was more than adequate to support the conspiracy count that Crochiere took boiling water from Lambert after saying he wanted a way to hurt Nieves. View or no view, Lambert plainly was competent to testify about what he did in his own cell and what he and Crochiere said there. Inmate Croteau also testified that he saw Crochiere walk past his cell in the direction of Lambert's cell, which was directly to the left of Croteau's cell. Croteau stated that he then heard Crochiere say to Lambert, "Can I get some of that?" and then observed Crochiere walk past Croteau's cell again, in the direction of Nieves's cell, this time carrying a cup of steaming liquid. A view would not have undercut any of this testimony, all directly relevant to the conspiracy count.

Crochiere argues that the view was relevant to the conspiracy count because it directly implicated the witnesses' credibility. Although a view might have had some indirect impact on the jury's assessment of witness credibility, Crochiere

had ample opportunity to, and did, impeach the witness's credibility in a variety of ways at trial. The jury nevertheless chose to believe the evidence supporting the conspiracy count, and a view was unlikely to have altered this outcome.

*Jury Instructions: Overt Acts*

Crochiere argues that the district court gave erroneous jury instructions on the elements of a conspiracy under § 241, because the court stated that the government was not required to prove the existence of an overt act in furtherance of the conspiracy. Crochiere did not submit any proposed instructions on § 241, nor did he object to the absence of an overt act instruction when specifically questioned on this issue by the district judge. In these circumstances, the standard of review is plain error. *See United States* v. *Alzanki,* 54 F.3d 994, 1003 (1st Cir. 1995). Under this standard, the burden rests with Crochiere to establish that "the error was 'clear,' in the sense that it was 'obvious', that it affected 'substantial rights,' and that failure to vacate (the conviction) would result in 'a miscarriage of justice.' " *Id.* (citing *United States* v. *Olano,* 507 U.S. 725, 731-38 (1993)).

There was no error, plain or otherwise, in Judge Wolf's instructions to the jury. Section 241 makes it unlawful for

> two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . .

18 U.S.C. § 241.

*Appendix A*

The question whether § 241 requires proof of an overt act is an issue that the Supreme Court has not specifically addressed. The Circuits have expressed conflicting views on the questions. The Ninth Circuit has held that § 241 does not require proof of an overt act. *See United States* v. *Skillman,* 922 F.2d 1370, 1375-76 (9th Cir. 1991). The Fifth Circuit has inconsistently stated both that § 241 does not require an overt act, *see United States* v. *Morado,* 454 F.2d 167, 169 (5th Cir. 1972), and that § 241 does require proof of an overt act, *see United States* v. *Greer,* 939 F.25 1076, 1099 (5th Cir. 1991), *United States* v. *McKenzie,* 768 F.2d 602, 606 (5th Cir. 1985); *United States* v. *Kimble,* 719 F.2d 1253, 1256 (5th Cir. 1983). In none of the Fifth Circuit cases, however, was the question a central issue in the case. The Sixth Circuit has stated, also in dictum, that § 241 does require proof of an overt act. *See United States* v. *Brown,* 49 F.3d 1162, 1160 (6th Cir. 1995).

This Circuit has never decided the question. The Supreme Count case of *United States* v. *Shabani,* 513 U.S. 10 (1994), we think, requires a holding that § 241 contains no overt act requirement. In *Shabani,* the Court found that there was no overt act requirement where the language of the drug conspiracy statute, there 21 U.S.C. § 846,[1] did not require proof of an overt act, and the common law of conspiracy at the time the statute was enacted did not require an overt act. *Accord United States* v. *Paiva,* 892 F.2d 148, 155 (1st Cir. 1989). The Supreme Court noted that the language of the statute does not require

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1. 21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

"that an overt act be committed to further the conspiracy, and [the Court has] not inferred such a requirement from congressional silence in other conspiracy statutes." *Shabani*, 513 U.S. at 13 (citing *Nash* v. *United States*, 229 U.S. 373, 378 (1913), holding that no overt act is required for conspiracy liability under the Sherman Act, and *Singer* v. *United States*, 323 U.S. 338, 340 (1945), holding that no overt act is required for conspiracy liability under the Selective Service Act). "*Nash* and *Singer* follow the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *Shabani*, 513 U.S. at 13. And, the Court continued, "the common law understanding of conspiracy 'does not make the doing of any act other than the act of conspiring a condition of liability.'" *Id.* at 13-14 (quoting *Nash*, 229 U.S. at 378).[2]

The same analysis must apply to a construction of § 241: absent a showing of legislative intent to the contrary, we assume that Congress intended to adopt the common law understanding of conspiracy when it used the word "conspire." The legislative history of § 241 reveals no contrary intent, and at common law "it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy." *Bannon* v. *United States*, 156 U.S. 464, 468 (1895), *quoted in Shabani*, 513 U.S. at 14.

In *Shabani*, the Court compared the language of the drug conspiracy statute, which contains no express overt act requirement, with the language of the general conspiracy

2. In response to Shabani's argument that the law does not punish criminal thoughts, the Court replied that "[t]he prohibition against criminal conspiracy, however, does not punish mere thought; the criminal agreement itself is the actus reus . . ." *Shabani*, 813 U.S. at 16.

statute, 18 U.S.C. § 371,[3] which does contain an express overt act requirement. The Court found this dichotomy "instructive," noting that "[i]n light of this additional element in the general conspiracy statute, Congress's silence in § 846 speaks volumes. After all, the general conspiracy statute preceded and presumably provided the framework for the more specific drug conspiracy stature." *Shabani,* 513 U.S. at 14.

The general conspiracy statute, 18 U.S.C. § 371, with its explicit overt act requirement, also preceded the enactment of § 241. The general conspiracy statute was originally enacted by Congress in 1867, 14 Stat. 484, Add. 25, and remains essentially unchanged today. The civil rights conspiracy statute, 18 U.S.C. § 241, was enacted in 1870, "as part of what came to be known as the Enforcement Act of 1870," *United States v. Price,* 383 U.S. 787, 801 (1966) (footnote omitted), and also remains in substantially the same form today. By the time it enacted what is now § 241, Congress had, when it wanted to import an overt act requirement, made it explicit. But Congress chose not to do so in § 241. We recognize, but are not persuaded by, a contrary argument that Congress, having placed the overt act requirement in the general conspiracy statute, felt it unnecessary to place such language in future conspiracy statutes although it fully intended the overt act requirement to apply. This argument cannot be squared with the *Shabini* Court's interpretation of congressional silence.

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3. 18 J.S.C §371 provides, in relevant part:

> If two or more persons conspire either to commit any offense against the United States . . . or any agency thereof in any manner or for any purpose, and one or more of such persons *do any act to effect the object of the conspiracy,* each shall [be subject to criminal penalties].

(emphasis added)

Our conclusion that Congress did not intend to require an overt act in § 241 is bolstered by Supreme Court cases that have emphasized the breadth of §§ 241 and 242, and the prosecutorial force that Congress intended to give them. In *Price*, the Court discussed the history of §§ 241 and 242. The Court noted that the statutes

> must be viewed against the events and passions of the time. The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. Congress had taken control of the entire governmental process in former Confederate States.
>
> . . . .
>
> Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. . . . On May 31, 1870, the Enforcement Act of 1870 [current § 241] was enacted.
>
> In this context, it is hardly conceivable that Congress intended § 241 to apply only to a narrow and relatively unimportant category of rights.

*Id.* at 803-05 (footnotes omitted). Although the *Price* Court's focus was on the rights that § 241 protects and not on the existence of an overt act requirement, its discussion provides strong support for the proposition that the Reconstruction Era Congress did not intend § 241 to have a narrow scope. Given this backdrop, it is difficult to imagine that Congress could have intended a definition of conspiracy in § 241 that was

*narrower* than the common law definition of the term. Were we to judicially import on overt act requirement, we would be narrowing the type of activity that Congress intended to reach when it enacted § *241.* This we are not authorized to do.

*Sufficiency of the Evidence*

Crochiere's final challenge to his conviction rests on the contentions that his conviction on the conspiracy count cannot stand because it is inconsistent with the acquittal on the substantive count, and that in any event the evidence on the conspiracy count was insufficient for a finding of guilty. We reject these claims.

Even if the verdicts were inconsistent, the Supreme Court and this court have clearly stated that inconsistent verdicts are no basis for setting aside a conviction.[4] *See United States* v. *Powell,* 469 U.S. 57 (1984) (reaffirming the rule in *Dunn* v. *United States,* 284 U.S. 390 (1932), that inconsistency of verdicts is not a basis for vacating a conviction, and rejecting any exceptions to the rule); *United States* v. *Lopez,* 944 F.2d 33, 41 (1st Cir. 1991) (noting that "the Supreme Court has made it clear that verdict inconsistency in itself is not a sufficient basis for vacating a conviction.") (citing *Powell,* 469 U.S. 57).

In any event, the verdicts in this case are not inconsistent because the elements of the two Counts are not identical. Count One of the indictment charged that Crochiere *conspired* with

4. Crochiere cites a Northern District of Illinois case for the proposition that inconsistent verdicts may require setting aside a conviction where those verdicts are based on charges with "virtually identical elements." *United States* v. *Infelise.* 813 F. Supp. 599 (N.D. Ill. 1993). That case is not controlling authority.

Lambert to violate Nieves's civil rights, while Count Two charged Crochiere with the actual act of violation—the pouring of the scalding liquid onto Nieves's lap. A guilty verdict on Count Two would have required the jury to find that Crochiere himself poured the hot liquid on Nieves, and that Crochiere's actions "result[ed] in bodily injury" to Nieves. The jury was not required to find either of these elements beyond a reasonable doubt to convict on the conspiracy count alone. The jury could easily have concluded that there was not enough evidence to prove beyond a reasonable doubt that Crochiere was the individual who actually poured the scalding liquid onto Nieves's lap. There was no eyewitness testimony regarding this act. On the other hand, there was eyewitness testimony on the conspiracy count. Lambert testified that he gave the cup of steaming water to Crochiere intending that the water be used to hurt Nieves. There was ample evidence from which the jury could have concluded that Crochiere was a willing participant, and harbored the same unlawful intent to punish Nieves. Crochiere had previously asked Lambert for salt to rub into Nieves's bleeding forehead. Croteau testified that he heard Crochiere say "give me some of that" to Lambert, and that moments later Crochiere walked past Croteau's cell with a cup of steaming water in the direction of Nieves's cell. Robichaud testified that he saw this exchange occur between Lambert and Crochiere.

In sum, a jury could easily have found sufficient evidence for a conviction on the conspiracy count, and insufficient evidence for a conviction on the substantive count, without these different outcomes being logically inconsistent. This analysis also disposes of Crochiere's claim that his motion for a judgment of acquittal should have been granted by the district court because the evidence was insufficient to support a finding

of guilty on the conspiracy count. *See United States* v. *Lopez*, 944 F.2d 33, 39 (1st Cir. 1991) (denial of motion for judgment of acquittal based on insufficiency of evidence claim is subject to deferential review).

*Affirmed.*

*Appendix A*

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1555

UNITED STATES OF AMERICA

Appellee,

v.

JAMES CROCHIERE

Defendant, Appellee.

JUDGMENT

Entered: November 18, 1997

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:

PHOEBE D. MORSE, CLERK

BY:_____
Chief Deputy Clerk

[cc: Messrs. Padellaro & Merritt]

## APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MARCH 11, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. CR 95-10312-01-MLW

ATTORNEY: Joseph W. Monahan, III Esq.

UNITED STATES OF AMERICA

V.

JAMES A. CROCHIERE

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT WAS FOUND GUILTY ON COUNTS: 1 AND NOT GUILTY AS TO COUNTS: 2

ACCORDINGLY, THE DEFENDANT IS ADJUDGED GUILTY OF SUCH COUNT(S), WHICH INVOLVED THE FOLLOWING OFFENSES:

| TITLE & SECTION | NATURE OF OFFENSE | DATE OFFENSE CONCLUDED | COUNTS |
|---|---|---|---|
| 18 USC Sec. 241 | Conspiracy to Violate Civil Rights | 4/18/93 | 1 |

THE DEFENDANT IS SENTENCED AS PROVIDED IN PAGES 2 THROUGH 4 OF THIS JUDGMENT. THE

*Appendix B*

SENTENCE IS IMPOSED PURSUANT TO THE SENTENCING REFORM ACT OF 1984.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL NOTIFY THE UNITED STATES ATTORNEY FOR THIS DISTRICT WITHIN 30 DAYS OF ANY CHANGE OF NAME, RESIDENCE OR MAILING ADDRESS UNTIL ALL FINES, RESTITUTION, COSTS AND SPECIAL ASSESSMENTS IMPOSED BY THIS JUDGMENT ARE FULLY PAID.

DEFENDANT'S SOC. SEC. NO. 034-52-1362

DEFENDANT'S DATE OF BIRTH: 1/17/69

DATE SENTENCE IMPOSED: 2-20-97

DEFENDANT'S LEGAL
ADDRESS: 270 Sunderland Road, Apt. 41
Worcester, MA 01604

US MARSHAL NO. 20840-038

MARK L. WOLF,

s/ Mark L. Wolf
U.S. DISTRICT JUDGE

DATED: March 11, 1997

*Appendix B*

IMPRISONMENT

THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE UNITED STATES BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF:

36 MONTHS.

X THE COURT MAKES THE FOLLOWING RECOMMENDATION TO THE BUREAU OF PRISONS:

The court recommends an institution that can address the safety concerns of the defendant, who is a former correctional officer.

* * *

X THE DEFENDANT SHALL SURRENDER FOR SERVICE OF SENTENCE AT ANY INSTITUTION DESIGNATED BY THE BUREAU OF PRISONS,

BY NOON ON April 14, 1997 (SEE ORDER OF FEB. 24, 1997)

* * *

*Appendix B*

SUPERVISED RELEASE

UPON RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE ON SUPERVISED RELEASE FOR A TERM OF: 36 MONTHS.

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME, SHALL NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE. THE DEFENDANT ALSO SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT (SET FORTH BELOW). IF THIS JUDGMENT IMPOSES A RESTITUTION OBLIGATION, IT SHALL BE A CONDITION OF SUPERVISED RELEASE THAT THE DEFENDANT PAY ANY SUCH RESTITUTION THAT REMAINS UNPAID AT THE COMMENCEMENT OF THE TERM OF SUPERVISED RELEASE. THE DEFENDANT SHALL COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS:

X THE DEFENDANT SHALL REPORT IN PERSON TO THE PROBATION OFFICE IN THE DISTRICT TO WHICH THE DEFENDANT IS RELEASED WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS.

X THE DEFENDANT SHALL NOT POSSESS A FIREARM OR DESTRUCTIVE DEVICE.

*Appendix B*

## STANDARD CONDITIONS OF SUPERVISION

WHILE THE DEFENDANT IS ON SUPERVISED RELEASE PURSUANT TO THIS JUDGMENT, THE DEFENDANT SHALL NOT COMMIT ANOTHER FEDERAL, STATE OR LOCAL CRIME. IN ADDITION:

1. the defendant shall not leave the judicial district without permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation within 72 hours of any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

*Appendix B*

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement or act as an informer or a special agent of a law enforcement agency without permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

X THE COURT ADOPTS THE FACTUAL FINDINGS AND GUIDELINE APPLICATION IN THE PRESENTENCE REPORT.

* * *

GUIDELINE RANGE DETERMINED BY THE COURT:

TOTAL OFFENSE LEVEL: 29

CRIMINAL HISTORY CATEGORY: I

IMPRISONMENT RANGE: 87 TO 108 MONTHS

*Appendix B*

SUPERVISED RELEASE: 24 TO 36 MONTHS

FINE RANGE: $15,000 TO $150,000

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

RESTITUTION: N/A

* * *

X for the following reason(s):
EXCEPTIONAL GOOD CHARACTER NOT AMOUNTING TO ABERRANT BEHAVIOR AND PROVOCATION INSUFFICIENT ALONE TO JUSTIFY A DOWNWARD DEPARTURE.

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED FEBRUARY 24, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Cr. No. 95-10312-MLW

UNITED STATES OF AMERICA

v.

JAMES A. CROCHIERE

ORDER

WOLF, D.J. February 24, 1997

On February 20, 1997, the court sentenced the defendant James Crochiere to serve 36 months in the custody of the Attorney General of the United States for his conviction, after trial, of violating 18 U.S.C § 241, which prohibits public officials such as Crochiere, who was a jail guard, from conspiring to injure, oppress, threaten, or intimidate a person in the enjoyment of a right protected by the laws of the United States.[1] The defendant, however, was acquitted of the related substantive charge of violating 18 U.S.C. § 242.

1. The court calculated the defendant's Total Offense Level as 29 and the Criminal History Category as I. The parties were of the view that the Total Offense Level should have been 27. This difference resulted from the court agreeing with the Probation Department that 2 points were to be added, pursuant to U.S.S.G. § 3A1.3, because the victim was physically restrained in the course of the offense. The court reached this conclusion because although the victim was lawfully restrained prior to the time that boiling water

(Cont'd)

*Appendix C*

After the defendant was sentenced, the government filed a motion for the defendant's detention pending appeal. The court took the motion under advisement. On reflection, the court finds the motion to be meritorious.

More specifically, the government in correct in its contention that the defendant's detention pending appeal is required by 18 U.S.C. § 3143(b)(2), which makes incarceration mandatory following sentencing for a crime of violence. A conspiracy to commit a crime of violence is itself a crime of violence. *United States v. Mitchell*, 23 F.3d 1, 3 (1st Cir. 1994). For the purposes of detention, 18 U.S.C. § 3156(a)(4) provides that a crime of violence includes:

> (B) any . . . offense that is a felony and that, by its nature, involves *a substantial risk* that physical force against the person or property of another *may* be used in the course of committing the offense. (emphasis added).

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(Cont'd)
was poured into his pants and onto his genitals, the restraint continued during the offense and increased the severity of it as it is doubtful that the boiling water could have been successfully targeted so selectively if he had not been restrained. With a Total Offense Level of 29, the Guideline range for incarceration was 87-108 months. If the Total Offense Level were 27, the Guideline range for incarceration would have been 70-87. Ultimately, however, the court departed downward to a 36 month sentence, pursuant to U.S.S.G. § 5K2.0, based on a combination of circus fences. The court would have imposed this same sentence even if tne Total Offense Level had been deemed 27. Thus, the resolution of the dispute regarding the restraint of the victim did not affect the sentence imposed and, therefore, turned out to be immaterial.

18 U S C. § 924(c), which relates to the carrying of a firearm, defines a crime of violence in the same terms. It has been held that for the purposes of 18 U.S.C § 924(c) a § 241 conspiracy to violate civil rights is a crime of violence because the offense involves a "substantial risk" of violence. *United States* v. *Greer,* 939 F.2d 1076, 1099 (5th Cir. 1991). This court agrees that a § 241 offense is a crime of violence. As the Court of Appeals for the Fifth Circuit said in *Greer*: "the words 'injure,' 'oppress,' 'threaten,' or 'intimidate' have definitions that assume force can be used." *Id.* Indeed, while it is not essential that force be used to commit a criminal violation of someone's civil rights, force is typical of a paradigmatic case, such as the instant case.

As the defendant's detention is required by 18 U.S.C. § 3143(b)(2), it is not necessary for the court to decide whether it is also required by § 3143(b)(1). In the interest of facilitating any possible appellate review, however, the court observes that the only arguably "serious question" on appeal, within the meaning of *United States* v. *Bayko,* 774 F.2d 516, 522-23 (1st Cir. 1985), might be the issue of whether an overt act is required to prove a § 241 conspiracy. As requested by the government, the court instructed that the government was not required to prove an overt act. *See* October 30, 1996 Transcript at 8-93. The defendant did not object. *Id.* at 8-96 to 8-99.

The Supreme Court had held that no overt act is required to prove a narcotics conspiracy in violation of 21 U S.C. § 846 because that statute is silent on that issue, in contrast to 18 U.S C. § 371 which contains an express overt act requirement. *United States* v. *Shabini*, 115 S.Ct. 382, 385 (1994). Like § 846, § 241 does not state that an overt act is required to commit the offense defined by that provision. One Circuit has held that it is not necessary to prove an overt act to establish a § 241

violation. *See United States* v. *Skillman*, 922 F.2d 1370, 1375-76 (9th Cir. 1991). At least one other judge of this District Court agrees. *See United States* v. *Three Juveniles,* 886 F.Supp. 934, 942 (D.Mass. 1995) (Saris, J.). The Fifth Circuit has expressed conflicting views on this question. *Compare Greer,* 939 F.2d at 1099 (an overt act is required); *United States* v. *McKenzie*, 768 F.2d 602, 606 (5th Cir. 1983)(same); *United States* v. *Kimble,* 719 F.2d 1253, 1256 (5th Cir. 1983)(same); *with United States* v. *Morado,* 454 F.2d 167, 169 (5th Cir. 1972) (no overt act required). The Sixth Circuit had held that § 241 requires proof of an overt act. *United States* v. *Brown,* 49 F.3d 1162, 1165 (6th Cir. 1995). As indicated earlier, because Crochiere's detention is mandated by 18 U.S.C. § 3143(b)(2), it is not necessary for this court to decide if the foregoing split in authority would justify his release under 3143(b)(1)

Accordingly, it is hereby ORDERED that:

1. The government's motion for the defendant's detention pending appeal is ALLOWED; and

2, Defendant James Crochiere shall, by 12:00 noon on April 14, 1997, report to the institution designated by the Attorney General of the United States for the service of his sentence.

s/ illegible
UNITED STATES DISTRICT COURT

## APPENDIX D — INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.
VIOLATIONS: 18 U.S.C. 241
(Conspiracy To Violate Rights);
18 U.S.C. 242
(Deprivation of Constitutional Rights)

UNITED STATES OF AMERICA

v.

JAMES A. CROCHIERE
RODNEY P. LAMBERT

INDICTMENT

*COUNT ONE*: 18 U.S.C. § 241 — Conspiracy To Violate Rights

The Grand Jury charges that:

On or about April 18, 1993, at the Worcester County Jail and House of Correction, in West Boylston, within the District of Massachusetts, the defendant

JAMES A. CROCHIERE

who was then employed as a correctional officer with the Worcester County Sheriff's Office, and the defendant,

*Appendix D*

RODNEY P. LAMBERT

who was then a pre-trial detainee at the Worcester County Jail and House of Correction, while acting under the color of the laws of the Commonwealth of Massachusetts, did willfully combine, conspire and agree to injure, threaten, oppress, and intimidate Jose Nieves, another pre-trial detainee at the jail and an inhabitant of the Commonwealth of Massachusetts, in the free exercise and enjoyment of the rights and privileges secured to him by the Constitution and laws of the United States not to be deprived of liberty without due process of law, which includes the right to be free from the use of unreasonable and excessive force amounting to punishment by one acting under color of law.

OVERT ACTS

1. After Jose Nives was immobilized in a restraint chair in his cell, defendant JAMES A. CROCHIERE walked to defendant RODNEY P. LAMBERT'S cell and obtained a cup of scalding liquid from defendant LAMBERT.

2. Defendant JAMES A. CROCHIERE carried the cup to Jose Nieves's cell and poured the scalding liquid on the genital and upper inner thigh areas of Nieves, resulting in second degree burns.

All in violation of Title 18, United States Code, Section 241.

*Appendix D*

***COUNT TWO*: 18 U.S.C. § 242 - Deprivation of Constitutional Rights; 18 U.S.C. § 2 - Aiding and Abetting**

The Grand Jury further charges that:

On or about April 18, 1993, at the Worcester County Jail and House of Correction, in West Boylston, within the District of Massachusetts, the defendant

JAMES A. CROCHIERE

who was then employed as a correctional officer with the Worcester County Sheriff's Office, and the defendant,

RODNEY P. LAMBERT

who was then a pre-trial detainee at the Worcester County Jail and House of Correction, while acting under the color of the laws of the Commonwealth of Massachusetts, aiding and abetting each other, did willfully assault Jose Nieves, a pre-trial detainee and an inhabitant of the Commonwealth of Massachusetts, by pouring scalding liquid on the genital and upper inner thigh areas of Nieves, and did thereby willfully deprive Jose Nieves of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, which includes the right to be free from unreasonable and excessive force amounting to punishment by one acting under color of law, resulting in bodily injury to Jose Nieves.

All in violation of Title 18, United States Code, Sections 242 and 2.

## APPENDIX E — RELEVANT STATUTES

### 18 U.S.C. § 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term or years or for life, or both, or may be sentenced to death.

### 18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or

to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

**18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.